Abdul Aziz bin Awang @ Muhammad & Ors v Tenaga Nasional Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-582–11 OF 2015
NORDIN HASSAN J
25 MAY 2018

Tort — Negligence — Destruction to properties and loss of lives — Defendant released waters from Sultan Abu Bakar Dam ('SABD') causing massive floods — Whether defendant's action was correct — Whether defendant was negligent — Whether defendant had taken all necessary measures to ensure safety — Whether principle in Rylands v Fletcher and res ipsa loquitor were applicable

The plaintiffs commenced this suit against the defendant for compensation and other reliefs arising from the defendant's action in releasing waters from Sultan Abu Bakar Dam ('SABD') in Cameron Highlands that caused destruction to the plaintiffs' properties and also loss of four lives. The defendant was the owner and operator of the SABD which was the main feature of the Cameron Highlands Hydroelectric Scheme that receives water from Sungai Habu, Sungai Bertam, Sungai Ringlet and other minor tributaries. In the early morning of 23 October 2013, three releases of water were made from the SABD by the defendant's employee. The said releases of water had caused massive floods which destroyed properties of the plaintiffs who resided or had their businesses or cultivation at Bertam Valley, Cameron Highlands and also loss of four lives. The issues for consideration were: (a) whether the defendant's action in conducting the three releases of water from the SABD was a correct decision which could not be avoided; (b) whether there was any negligent on the defendant's part in handling the releases of water from the SABD; (c) whether the defendant had taken all the necessary measures to maintain the SABD and Cameron Highlands Hydroelectric Scheme to ensure the safety of the dam, the people and properties particularly at Bertam Valley; and (d) whether the principle in *Rylands v Fletcher* and res ipsa loquitor were applicable.

Held:

(1) The court did not see any reason for the defendant for not having a water inflow measurement instrument since the dam started its operation in 1963 and only realised to have one after the incident in 2013. Failing to have one was a negligent act on the part of the defendant (see para 34).

(2) The defence that the water level of the dam had increased rapidly because

of the heavy rain and the water had to be released to avoid catastrophe of massive floods and destruction of the dam did not exonerate the defendant for any negligent conduct. The defendant had failed to maintain the SABD and the appropriate water level of the dam, taking into account particularly the monsoon season in the month of October when the incident happened in this case. The defendant was also negligent in executing the releases of water on the said 23 October 2013 (see paras 35 & 39).

(3) The releases of water on 23 October 2013 in the amount that were released which caused floods to Bertam Valley was not a correct decision in the absence of the inflow measurement gauge to justify the releases (see para 44).

(4) The principle in *Rylands v Fletcher* which attached the doctrine of strict liability was applicable in this case. The defendant's argument that there was no element of 'escape' of water as it was a controlled spilling by the defendant did not prevent the application of this principle. The intentional act of controlled spilling was more serious than unintentional 'escape' of water from the dam. The principle of res ipsa loquitor also had its application in this case. The defendant failed to take proper care of the SABD particularly to conduct the necessary dredging and desilting in a large scale regularly. The defendant also failed to have an inflow measurement gauge to assist the defendant to ensure the amount of water to be released if necessary (see paras 45 & 51–52).

(5) The plaintiff had proved its case against the defendant on the balance of probabilities and the defendant was liable for the floods that caused destruction to the plaintiffs' properties and loss of lives (see para 54).

[Bahasa Malaysia summary

Plaintif memulakan guaman ini terhadap defendan untuk pampasan dan relif lain yang timbul daripada tindakan defendan dalam melepaskan air dari Empangan Sultan Abu Bakar ('SABD') di Cameron Highlands yang menyebabkan kemusnahan terhadap harta plaintif dan juga kehilangan empat nyawa. Defendan adalah pemilik dan pengendali SABD yang merupakan ciri utama Skim Hidroelektrik Cameron Highlands yang menerima air dari Sungai Habu, Sungai Bertam, Sungai Ringlet dan anak sungai kecil lain. Pada awal pagi 23 Oktober 2013, tiga pelepasan air dibuat dari SABD oleh pekerja defendan. Pelepasan air tersebut telah menyebabkan banjir besar yang memusnahkan harta benda plaintif yang tinggal atau menjalankan perniagaan atau penanaman di Lembah Bertam, Cameron Highlands dan juga kehilangan empat nyawa. Isu-isu untuk pertimbangan adalah: (a) sama ada tindakan defendan dalam menjalankan tiga pelepasan air dari SABD adalah keputusan yang betul yang tidak dapat dielakkan; (b) sama ada terdapat kecuaian oleh

defendan dalam mengendalikan pelepasan air dari SABD; (c) sama ada defendan telah mengambil semua langkah yang perlu untuk memantau Skim Hidroelektrik SABD dan Cameron Highlands untuk memastikan keselamatan empangan, rakyat dan harta khususnya di Lembah Bertam; dan (d) sama ada prinsip di *Rylands v Fletcher* dan res ipsa loquitor terpakai.

Diputuskan:

(1) Mahkamah tidak melihat apa-apa sebab bagi defendan untuk tidak mempunyai instrumen pengukuran arus masuk air sejak empangan itu memulakan operasinya pada tahun 1963 dan hanya menyedari untuk mempunyai satu selepas insiden pada tahun 2013. Kegagalan untuk mempunyai satu merupakan satu perbuatan cuai di pihak defendan (lihat perenggan 34).

(2) Pembelaan bahawa paras air empangan telah meningkat dengan cepat kerana hujan lebat dan air harus dilepaskan untuk mengelakkan bencana banjir yang besar dan pemusnahan empangan itu tidak melepaskan defendan untuk melakukan kelalaian. Defendan telah gagal untuk memantau SABD dan paras air yang sesuai bagi empangan, dengan mengambil kira terutamanya musim tengkujuh pada bulan Oktober apabila kejadian berlaku dalam kes ini. Defendan juga lalai dalam melaksanakan pelepasan air pada 23 Oktober 2013 (lihat perenggan 35 & 39).

(3) Pelepasan air pada 23 Oktober 2013 dalam jumlah yang dilepaskan yang menyebabkan banjir ke Lembah Bertam bukanlah keputusan yang betul jika tidak ada tolok pengukuran arus masuk untuk mewajarkan pelepasan (lihat perenggan 44).

(4) Prinsip di *Rylands v Fletcher* yang meletakkan doktrin liabiliti tegas terpakai dalam kes ini. Hujahan defendan bahawa tidak ada unsur 'pelepasan' air kerana ia adalah pelepasan terkawal oleh defendan tidak menghalang pemakaian prinsip ini. Tindakan yang disengajakan terhadap pelepasan terkawal adalah lebih serius daripada 'pelepasan' air dari empangan yang tidak disengajakan. Prinsip res ipsa loquitor juga terpakai dalam kes ini. Defendan gagal mengambil penjagaan yang sewajarnya terhadap SABD khususnya untuk melakukan pengorekan dan pengeluaran kelodak yang diperlukan dalam skala besar secara teratur. Defendan juga gagal mempunyai tolok pengukuran arus masuk untuk membantu defendan memastikan jumlah air yang akan dikeluarkan jika perlu (lihat perenggan 45, 51 & 52).

(5) Plaintif telah membuktikan kesnya terhadap defendan di atas imbangan kebarangkalian dan defendan bertanggungjawab terhadap banjir yang menyebabkan kemusnahan harta benda dan kehilangan nyawa plaintif (lihat perenggan 54).]

Cases referred to

Abdul Rahman bin Che Ngah & Ors v Puteh bin Samat [1978] 1 MLJ 225 (refd)
Colvilles Ltd v Devine [1960] 2 All ER 53, HL (refd)
Doherty v Allen [1987] NBJ No 1132 (refd)
Lembaga Kemajuan Tanah Persekutuan v Tenaga Nasional Bhd [1997] 2 MLJ 783, HC (refd)
Rylands v Fletcher (1868) LR 3 HL 330, HL (folld)
Sim Ah Oh v Public Prosecutor [1962] MLJ 42 (refd)
Syed Abu Bakar bin Ahmad v Public Prosecutor [1984] 2 MLJ 19, FC (refd)
United Asean Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182, SC (refd)
Vohra Sadikbhai Rajakbhai and others v State of Gujerat & Others [2016] 5 MLJ 10; LNIND 2016 SD 231, SC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

M Manogaran (Manogar & Co) for the plaintiffs.
Harikannan Rogavand (Banita Punnusamy with him) (Jayadeep Hari & Jamil) for the defendant.

Nordin Hassan J:

INTRODUCTION

[1] The plaintiffs commenced the present suit against the defendant for compensation and other reliefs arising from the defendant's action in releasing waters from Sultan Abu Bakar Dam ('SABD') in Cameron Highland that caused destruction to plaintiffs' properties and also loss of four lives.

THE BACKGROUND FACTS

[2] The salient facts in this case amongst others are the the following:

(a) the defendant is the owner and operator of Sultan Abu Bakar Dam ('SABD') which is the main feature of the Cameron Highland Hydroelectric Scheme that receives water from Sungai Habu, Sungai Bertam, Sungai Ringlet and other minor tributaries;

(b) the SABD's main function is to supply water to Sultan Yusof Power Station ('JOR Station') through an underground tunnel and penstock from Bertam Intake. The high pressured water will turn the turbines which are connected to the generator and produced electricity for the users. Apart from this, SABD also serves to control flood;

(c) the SABD has spillway gates comprises of one tilting gate and three radial gates where its function is to control the overflow of water from the reservoir. The tilting gate will automatically open when the reservoir water level is at 3,513 ft and fully open when the water level reaches 3,514 ft. At this level the estimated water discharge rate will be at approximately 2,300 cubic feet per second or 65.13 cubic meter per second. The radial gates will automatically open at a water level of 3,514.08 and it is fully open when the water level reaches 3,515 ft. At this level the water discharge rate is about 10,600 cubic feet per second or 300.16 cubic meter per second;

(d) the tilting gate can also be opened manually by operation of valves and at or above the level of gate control intake which is 3,510.75 ft and the radial gates which is at or above 3,508 ft;

(e) the original minimum water level of the reservoir was at 3,474 ft and the top water level was at 3,515 ft whilst the danger level of the reservoir is at 3,508 ft. At the material time, the defendant minimum operational water level was at 3,495 ft;

(f) in the early morning of 23 October 2013, three releases of water were made from the SABD by the defendant's employee which are as follows:

(i) the first release was at 12.05am when the water level of the reservoir reached 3,509.5 ft;

(ii) the second release at 1.05am when the water level at 3,510.2 ft; and

(iii) the third release was at 2.45am when the water level reached 3,509.6 ft;

(g) the said releases of water from SABD had caused massive floods which destroyed properties of the plaintiffs who resides or had their businesses or cultivation at Bertam Valley, Cameron Highlands and also lost of four lives.

THE PLAINTIFFS' CASE

[3] The crux of the plaintiffs' case is that the defendant was negligent in handling the releases of water on the said 23 October 2013 and also has failed to maintain the SABD and the Bertam Intake Screen (BIS) in order to avoid the releases of water as happened on the 23 October 2013 which caused the massive floods.

[4] The plaintiffs contend that there was negligent on the part of the defendant in executing the releases of waters at the material time which can be

summarised, inter alia, as follows:

(a) failure to have the water inflow measurement instrument to measure the inflow of water to the SABD;

(b) failure to monitor closely the water level at SABD; and

(c) failure to take necessary action to release water to JOR station which will reduce the water level at SABD.

[5] In regard to the maintenance of the SABD, the plaintiffs contend that the defendant has failed to conduct dredging and clearing of sediments on a regular basis which can increase the water storage in the reservoir and avoid controlled spilling which caused the floods.

[6] Likewise the Bertam Intake Screen (BIS) that filters rubbish, debris and other waste which the plaintiffs contend that the defendant has failed to maintain and ensure that it does not chocked as happened at the material time which resulted the four turbines not functioning as no or insufficient water was channelled to the turbines. This had increased the water level of SABD.

[7] It is also the plaintiffs' pleaded case that the principle in *Ryland v Fletcher* and res lpsa loquitor are applicable in the present case.

THE DEFENDANT'S CASE

[8] Basically, the defendant's case premised on its contention that the three releases of water on 23 October 2013 were justified and was a correct decision in order to avoid the spillway gates to automatically open which will caused massive floods to Bertam Valley and consequently will caused widespread destruction to properties and loss of lives.

[9] The defendant contends that all necessary safety measures has been taken in executing the releases of water during the material time.

[10] The defendant also contends that it has taken all the necessary actions in maintaining the SABD and the Bertam Intake Screen. This includes regular desilting and dredging work and cleaning of the BIS throughout the years.

[11] Further, the defendant submits that the continued act of deforestation, intensive agricultural activities and disposal of rubbish upstream has affected the water holding capacity of the reservoir as it increased the sedimentation and solid waste in the reservoir. It also caused chockage at the Bertam Intake Screen.

[12] The defendant further submits that the principle in *Ryland v Fletcher* as well as res lpsa loquitor has no application in this case.

ISSUES TO BE TRIED

[13] The main issues to be tried in the present case are the following:

(a) whether the defendant's action in conducting the three releases of water from SABD on 23 October 2013 was a correct decision which cannot be avoided;

(b) whether there was any negligent on the defendant's part in handling the releases of water from the SABD;

(c) whether the defendant has taken all the necessary measures to maintain the SABD and Cameron Highland Hydroelectric Scheme to ensure the safety of the dam, the people and properties particularly at Bertam Valley; and

(d) whether the principle in *Ryland v Fletcher* and res lpsa loquitor are applicable in the present case.

FINDINGS OF THIS COURT

[14] At the outset, the undisputed facts here is that, the SABD is owned and maintained by the defendant primarily for the Cameron Highland Hydroelectric Scheme that generates electricity for the defendant's business.

[15] It is also an established fact that the releases of water from SABD on 23 October 2013 had caused massive floods to Bertam Valley which caused destruction of properties and loss of lives.

[16] First and foremost, I find, the controlled spilling or releases of water from SABD on 23 October 2013 has close connection with storage capacity of water in the reservoir.

[17] In this regard, the original minimum water level of the reservoir as mentioned in a write-up at para 6 titled 'Operation Regulation of Reservoir of SABD', is at 3,474 ft and its top level at 3,515 ft. It is an undisputed fact that the operational minimum water level at the material time was increased to 3,495 ft which caused the lost of 21 ft of water storage. This decreased of water storage is due to the problems of sedimentation and rubbish in the reservoir.

[18] In this connection, the pertinent question here is whether the defendant has taken sufficient measures to maintain the appropriate water level

of SABD, particularly taking into account the rainy season.

[19] Here, it is not disputed that the defendant has taken step to clear sedimentation and rubbish in the reservoir over the years but on the material date, the problem of sedimentation has not been solved where the minimum water level was at 3,495 ft with the lost of 21 ft of water storage.

[20] The defendant, amongst others has shifted the blame to continued act of deforestation, intensive agricultural activities and disposal of rubbish upstream as the cause of the said problem which continues to persist.

[21] In this regard, it is undeniable that those acitivities contributes to the problems of sedimentation and accumulation of rubbish in the reservoir but as the owner of the dam, who has the bounden duty to ensure the safety of the residents downstream and their properties, it is defendant's responsibility to take all the necessary measures to maintain the water level of the dam at a safe level particularly during monsoon season. One of the step is to conduct a large scale of dredging or desilting regularly, irrespective of the cost to be incurred as lives and properties of the residents is the paramount importance.

[22] This dredging or desilting in a large scale is not something impossible as after the said incident, the defendant has increased the volume for desilting of sendiments and according to DW2, from 250,000 cubic meters per year to 500,000 cubic meters per year and managed to increase the water storage of about four feet. However this was not done earlier before the said incident.

[23] Moreover, the danger of releasing waters from SABD which would cause floods to Bertam Valley was acknowledged by the defendant since 2011 when the defendant's officers wrote an article on this issue. As such, the defendant could have taken all the appropriate measures since 2011 including the large scale of desilting and not only after the incident on 23 October 2013.

[24] Likewise the Bertam Intake Screen, it is the duty of the defendant to ensure that it is not choked and water can be channelled to the JOR station which will reduce the water level of the reservoir and as such releases of water from the dam can be avoided. This is not the case at the material time as the defendant contends that the BIS was choked and water was unable to be channelled to the JOR station.

[25] To me, by saying that at the material time it was an extra ordinary heavy rain which carried a huge volumes of rubbish which then chocked the BIS does not ward off the defendant's responsibility to maintain the BIS and to ensure that it function at all time. Taking into account the risk of the increase of water

level at the dam particularly during rainy season.

[26] In relation to this, the issue of when the exact time the BIS was chocked and caused the four turbines at JOR station to stopped functioning as no water was channelled to turn the turbines is an important issue.

[27] If BIS was chocked much earlier before the said heavy rain on 23 October 2013, the defendant's reliance on the fact that BIS was chocked by rubbish brought during the heavy rain is untenable.

[28] This issue can be resolved if the power generation report for JOR station was produced in court as requested by the plaintiffs. However, the said report was not made available to this court. The defendant's expert, DW1, also agreed that the report would have shown whether the four turbines at JOR station were functioning or otherwise at the material time.

[29] The said report certainly will also clear the doubt as to why the water level at 3.30am on 23 October 2013 had reduced from 3,608 ft to 3,507 when no water can be released from spillway gates of 3,508 ft and below. This resulted to the plaintiff's contention that water was in fact channelled to the JOR station at the material time and BIS was not chocked.

[30] In the circumstances, I find that s 114(g) of the Evidence Act 1950 is applicable against the defendant.

[31] Apart from this, it is also an undisputed fact that there was no water inflow measurement instrument install at SABD before the incident, it was only installed after the said incident.

[32] This instrument is important to know the water inflow in the reservoir and will assist the defendant's employee at SABD to decide the amount of water to be released at the material time on the basis of the principle of outflow equals to inflow.

[33] Even, the defendant's expert, DW1, also acknowledged the importance of having this inflow measurement gauge when DW1 said this in his report:

> It should be noted the rule of keeping outflow equals inflow would only apply in the case whereby the inflow is known. At the time of flooding of 23rd October 2013, *no real-time measurement of the rate of inflow was available.* The rate of rise of reservoir level would depend on the inflow if there was no outflow through the penstock(s). However, when the gate(s) were opened, *there was no real-time information of the inflow.*

[34] In view of this, I do not see any reason for the defendant for not having such an important instrument since the dam starts its operation in 1963 and only realised to have one after the incident in 2013. To me, this instrument should be installed at the very beginning of its operation to assist in maintaining the appropriate water level of the dam and to ensure the volume of water to be released if necessary. Failing to have one, I find, is a negligent act on the part of the defendant. More so as the omission has put the lives and properties of residents of Bertam Valley at risk and the risk turn into tragedy in the incident on 23 October 2013.

[35] The defence that the water level of the dam had increased rapidly because of the heavy rain and the water had to be released to avoid catastrophy of massive floods and distruction of the dam, I find, does not exenorate the defendant for any negligent conduct.

[36] In connection to this, the onus was on the defendant to prove that the SABD has been maintained properly including maintaining the appropriate water level of the dam particularly during monsoon season.

[37] The Supreme Court of India in the case of *Vohra Sadikbhai Rajakbhai and others v State of Gujerat & Others* [2016] 5 MLJ 10; LNIND 2016 SD 231 which decided on similar issue of releasing water from a dam that caused destruction to properties explained in the following manner:

> 15. *Since the dam is constructed and maintained by the respondents and the appellants suffered losses as a result of release of water from the said dam, onus was on the respondents to prove that they had taken proper care in maintaining appropriate level of water in the dam taking into account the provision for the water that can get accumulated in the said dam due to the forthcoming rainy season. The respondents are the owners of the dam in question. They are expected to keep the said dam in such a condition which avoids any loss or damage of any nature to the neighbours or passers by. The doctrine of strict liability, which has its origin in the case of Rylands v Fletcher* (1868) LR 3 HL 330, *will have application in the instant case. Following observations of Blackburn, J. State the principle of strict liability:*
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> > The rule of law is that the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its excape.
>
> The learned Judge went further to expound the aforesaid principle in the following manner:
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> > The general rule as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the fifth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali work is damnified without

any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which has not naturally there, harmless to other so long as it is confined to his own property, but which he knows to the mischievous if it gets on his neighbour's should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. (Emphasis added.)

[38] In the same case, where the facts is similar to the present case, Justice Mr AK Sikri said this:

28. The respondents have not refuted the aforesaid averment of the appellants. The only defence put up by them was that the overflow of the water in the dam was occasioned by the rains on the monsoon season which compelled the authorities to release the water from the dam in larger public interest. In such a scenario, it was incumbent upon the respondents to demonstrate, by adequate evidence, that the water in the dam was kept at reasonable and proper level to take care of normal rains, the rains in the said monsoon season were more than the ordinary rains which could not be foreseen; and that the public purpose was served in taking the decision to release the water which prevented larger catastrophe. *Merely by saying that the level of water in the dam increased because of monsoon rains and that the water was released in public interest cannot be treated as discharging the burden on the part of the respondents in warding off the allegation of negligence.* It is a matter of common knowledge that with advanced technology available with the Meteorological Department in the form of satellite signals etc, there is a possibility of precise prediction ofthe extant of rainfall in the monsoon season. (Emphasis added.)

[39] Having considered the evidence in totality, it is my findings that the defendant has failed to maintain the SABD and the appropriate water level of the dam, taking into account particularly the monsoon season in the month of October when the incident happened in this case. The defendant was also negligent in executing the releases of water on the said 23 October 2013.

[40] As to the evidence of expert witnesses in this case which are PW1 and DW1, it is trite law that their evidence is only to assist this court to arrive to a correct decision where the court is unable to do so without the expert assistance who have acquired special skill and experience on a particular subject.

(*Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19 (FC)).

[41] However, the evidence of an expert must be supported by reasons and to be tested like any other evidence against the facts upon which the expert is disposing.

(*United Asean Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 (SC); *Sim Ah Oh v Public Prosecutor* [1962] MLJ 42).

[42] In the present case, DW1 is of the view that the controlled spilling or the three releases of water on 23 October 2013 by the defendant was a correct decision. However, when cross examined by counsel for the plaintiff with regard to the second and third releases of water, DW1 said that he is unable to tell whether the releases were correct or not as the water were released without knowing the inflow rate in the absence of the inflow measurement gauge.

[43] As alluded to earlier, this inflow measurement instrument is pertinent to know the inflow rate and to decide how much water to be released from the dam. Without such instrument, as in the present case during the incident, it cannot be said that the three releases of water are correct when they have no idea how much water was to be released. DW1 himself testified that the water was released only based on the water level of the dam and in the hindsight, DW1 said that the water level that were released was high. As such, DW1 opinion on the correctness of the releases of water is devoid of any justification.

[44] As such, my finding is that the releases of water on 23 October 2013 in the amount that were released which caused floods to Bertam Valley is not a correct decision in the absence of the inflow measurement gauge to justify the releases.

[45] Apart from this, I am also of the view that the principle in *Ryland v Fletcher* which attached the doctrine of strict liability is applicable in the present case.

[46] In this regard, it is instructive to refer to the observation by Lord Cairns in *Rylands v Fletcher* (1868) LR 3 HL 330 as follows:

> We think that the true rule of law is, that *the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, prima facie answerable for all the damage which is the natural consequence of its escape.* He can excuse himself by shewing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of vis major, or the act of God.

[47] This principle is a strict liability without having to prove negligence by the defendant has also been explained in the case of *Lembaga Kemajuan Tanah Persekutuan v Tenaga Nasional Bhd* [1997] 2 MLJ 783 as follows:

> It was pointed out earlier that an occupier of a house or land is liable for the escape of fire from his premises if his fire was caused wilfully, or by his negligence. *He is also*

liable under the Rylands v Fletcher principle by the escape without negligence which has been brought into existence by some non-natural use of the land. In *Musgrove v Pandelis* [1919] 1 KB 314 at p 317, Lush J applied theprinciple in *Rylands v Fletcher* thus:

> But nevertheless, I am of opinion that the statute [the Fires Protection (Metropolis) Act 1774] affords the defendant no protection; for though the fire in the carburettor was accidental in a popular sense, I do not think it was accidental in the sense in which that term is used in the statute. If a man brings on to his premises a dangerous thing which is liable to cause fire, such as a motor car with petrol in it, the carburettor of which is not unlikely to get on fire when the engine is started, and a fire results, though without any negligence on his part, he must be held liable, the statute notwithstanding, for the rule is that he must keep such a thing under control at his peril. If a person uses a traction engine which emits spartks in spite of all precautions being taken to prevent their emission, he will be liable if another person's hayrick be set on fire by the sparks, upon the ground that such an engine is a dangerous machine: *Powell v Fall* (1880) 5 QBD 597. And if the principle of *Rylands v Fletcher* applies to the fire in a traction engine, it must equally apply to a motor car in such circumstances as these.

The Court of Appeal in [1919] 2 KB 43, approved Lush J's application of the principle of *Ryland v Fletcher* in that case. (Emphasis added.)

[48] Likewise in the case of *Abdul Rahman bin Che Ngah & Ors v Puteh bin Samat* [1978] 1 MLJ 225 where Abdul Razak J said this:

> In the alternative, *even if negligence was not proved, in my view the defendant was still liable under Rylands v Fletcher for the escape of the fire resulting from an unnatural user of the land.* Linsell on Tort 13th Edition page 860 says 'Fire is a dangerous thing and consequently the principle of Rylands and Fletcher applies to it. Accordingly, if a man burnt weed on his land and the fire spread to the adjoining land he was held liable'. *The principle is one of strict liability without proof of negligence.*

[49] In *Doherty v Allen* [1987] NBJ No 1132, it states:

> To deal with the merits of the plaintiffs' claim, in my view they have unquestionably established the liability of the defendants Allen and the Allen company (whom for reasons earlier stated, I deal with as one). What has become known as the Rule in *Rylands v Fletcher* is sufficient alone to establish the existence of that liability. The rule as formulated in *Salmond & Heuston on Torts* (18th Ed) at p 297 is as follows:
>
> > The occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, *even if he has been guilty of no negligence* (*St Anne's Well Brewery Co v Roberts* (1928) 140 LT 1, 6; *Hale v Jennings Bros,* [1938] 1 All ER 579 at p 584; *Read v J Lyons & Co Ltd,* [1945] KB 216 at p 247; *Vaughn v Halifax-Dartmouth Bridge Commission* (1961) 29bD.L.R (2d) 523 at p 525).

[50] In the present case, the SABD is owned and maintained by the

defendant. On the 23 October 2013 the defendant had released water from the dam which caused floods and destruction to properties and loss of lives at Bertam Valley. This squarely falls within the facts for the application of the *Rylands v Fletcher*'s principle.

[51] The defendant's argument that there was no element of 'escape' of water as it was a controlled spilling by the defendant does not prevent the application of this principle. To me, the intentional act of controlled spilling is more serious than unintentional 'escape' of water from the dam.

[52] I am also of the view that the principle of res ipsa loquitor has its application in this case. The incident on 23 October 2013 happened as the defendant failed to take proper care of the SABD particularly to conduct the necessary dredging and desilting in a large scale regularly. The defendant also failed to have an inflow measurement gauge to assist the defendan to ensure the amount of water to be released if necessary.

[53] In *Colvilles Ltd v Devine* [1960] 2 All ER 53, the House of Lords held as follows:

> (i) *the plant (including the hose which caught fire) was under the management of the appellants and,* since an explosion of such violence would not have occurred in the ordinary course of things if those who had the management had taken proper care, the maxim res ipsa loquitur applied; and
>
> (ii) it was not necessary that there should be positive proof of the existence of the particles in the oxygen stream in order to establish the appellants' explanation, but for that explanation to be available as a defence it must be consistent with no negligence on their part; accordingly, the appellants not having adduced evidence of any inspection of the filters in the oxygen stream, they had not discharged the onus imposed on them by the maxim.

[54] Based on the foregoing, I find, plaintiff has proved its case against the defendant on the balance of probabilities and it is my finding that the defendant is liable for the floods that caused destruction to the plaintiffs properties and loss of lives on the 23 October 2013.

[55] The quantum of damages to the plaintiffs is to be assesed by the deputy registrar.

[56] I also order costs of RM50,000 to be paid to the plaintiffs and costs is subject to payment of allocator fee.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh